

MEMORANDUM

September 9, 1996

TO: Judge Phyllis Reha

RE: MFS's motion to exclude US West's TELRIC study from arbitration

Issue

MSF's motion to exclude US West's TELRIC study from consideration in the arbitration hearing on September 12, 1996. The alternative suggested by MFS is to use the FCC's price proxy guidelines as an interim measure until they have a thorough opportunity to analyze the TELRIC data. This is the approach used by the Arizona Corporation Commission during the recent arbitration in that state. US West's suggested alternative is to shelve the cost issue until a later date so both sides have ample time to analyze cost proposals.

The Administrative Law Judge must:

- A. Determine whether these alternatives are valid under the FCC guidelines, and if so, which alternative is the best:
- B. Avoid any action that could cause the FCC to preempt Minnesota's right to decide the issues.

Rules of law regarding FCC guidelines on arbitrating cost

General Pricing Standard

"An incumbent LEC's rates for each element it offers shall comply with the rate structures rules set forth in 51.507 and 51.509 of this part, and shall be established, at the election of the state commission--

- (1) pursuant to the forward-looking economic cost-based pricing methodology set forth in 51.505 and 51.511 of this part; or
- (2) consistent with the proxy ceilings and ranges set forth in 51.513 of this part." 47 C.F.R. 51.503(b)(1)(2) Subpart F, Appendix B, Amendments to the Code of Federal Regulations.

Forward Looking Economic Cost [TELRIC studies]

"An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and 51.511 of this part [TELRIC study].

- (1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in 51.513 of this part only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and 51.511 of this part in a state proceeding that meets the requirements of paragraph (e)(2) of this section." 47 C.F.R. 51.505(e)(1) Subpart F, Appendix B, Amendments to the Code of Federal Regulations.

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Proxies for forward-looking economic cost

“A state commission may determine that the cost information available to . . . does not support the adoption of a rate or rates that are consistent with the requirements set forth in 51.505 and 51.511 of this part. In that event, the state commission may establish a rate for an element that is consistent with the proxies provided in this section, provided that:

(1) any rate established through use of such proxies shall be superseded once the state commission has completed review of a cost study that complies with [TELRIC] . . .” 47 C.F.R. 51.513(a)(1) Subpart F, Appendix B, Amendments to the Code of Federal Regulations.

Analysis of Rules on Cost

The FCC has shown a preference for TELRIC studies, and in fact requires a price set on a thorough evaluation of an LEC’s proposal. However, the FCC also realizes that this issue cannot be decided fairly in a cursory manner. In order to meet its main objective of promoting competition in an expedited manner while maintaining fairness, it established a group of price proxies that could be applied during an interim period. This exemplifies that the FCC’s main concern is to get the competitors into the market and iron out the cost details later. The FCC state that no rate which is outside the proxy ranges or above the proxy ceiling should be set until there has been a full and fair hearing. A full and fair hearing will be impossible on this short notice, so allowing this TELRIC to be arbitrated at the upcoming arbitration will not meet the requirements of C.F.R. §51.505. This allows the Administrative Law Judge to use the default proxy prices listed in C.F.R. §51.513, as long as it is understood that these are only temporary prices until a fair hearing can be held to establish the true cost, using the FCC methodology.

On this basis, it would seem that the law not only permits, but requires, that the proxy prices be used until a thorough evaluation of US West’s TELRIC proposal has taken place.

Rules on Preemption of State Jurisdiction

There are two conditions under which the FCC can preempt the State’s jurisdiction over arbitration under the Telecommunications Act of 1996:

1) “If a state commission fails to act to carry out its responsibility under this section [by not acting to approve or reject the agreement adopted by the parties under arbitration within 30 days] then the [FCC] shall issue an order preempting the State commission’s jurisdiction.” 47 U.S.C. §252(e)(4)(5).

2) “If, after notice and an opportunity for public comment, the Commission determines that a State . . . has permitted or imposed any, statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such [regulation] to the extent necessary to correct such violation . . .” 47 U.S.C. § 253(d).

Analysis on Preemption

Because arbitration is taking place in a timely manner which will allow the competitive entry into the local markets, there will be no problem with preemption under 47 U.S.C. §252.

However, if as US West suggests, the cost portion of this arbitration is put off until a later date, the competitors will not be allowed to enter because there will be no cost agreement within the specified time period. The FCC has clearly wanted to avoid just this situation by putting in place its list of interim proxy price rates. Therefore, to avoid preemption, US West's proposal must be rejected.

Of more concern would be arbitrating the present US West TELRIC proposal before it has received adequate consideration. Because C.F.R. §51.505 requires a full and fair hearing prior to setting prices which exceed the proxy ceilings, MFS could file a complaint with the FCC that the State has imposed a requirement that violates 47 U.S.C. §253(a) if those costs are prohibitively high. At that point the FCC would step in and establish rates which might not meet the best interests of the Minnesota citizenry.

Therefore, in order to avoid preemption of either kind it is best to use the price proxy rates until a further expedited evaluation can be made.

Conclusion

In the interests of fairness and in order to meet the requirements established by the FCC to avoid preemption, the MFS motion to exclude US West's TELRIC study proposal from the upcoming arbitration.